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SUPREME COURT, U.S.

IN THE  
SUPREME COURT OF THE UNITED STATES  
No. 77-6431

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ABDIEL CABAN,

Appellant,

- against -

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

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BRIEF IN OPPOSITION TO MOTION TO  
DISMISS OR TO AFFIRM

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ROBERT H. SILK  
Suite 1701  
401 Broadway  
New York, New York 10013  
(212) 966 1545  
Attorney for Appellant

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of Malpica-Orsini

In The  
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## INTRODUCTION

Appellees do not challenge the underlying facts showing the strong ties between the appellant and his children which is contained in the Jurisdictional Statement. They deftly try to avoid its implications. Their motion to dismiss or affirm is a study in the art of confusion. Its purpose is to avoid confronting the inevitable constitutional issues of Due Process and Equal Protection.

Only "abandonment" by appellant had been alleged by appellees in their adoption petition as the basis for denying him his parental rights. In granting the adoption of appellant's two children, the State had dismembered his family without proof and specific findings of abandonment or unfitness. The courts below ignored his repeated invocation of his constitutional rights.

Their sole rationale was the claimed constitutionality of Section 111. That statute denied him the right to preserve his family solely because he was the (1) unmarried (2) male parent. This, despite the fact that he shared custody, participated in raising and rearing them, had exclusive custody shortly before the adoption petitions and despite the fact that custody litigation with the mother pended undetermined on the merits in another court.

To accomplish their diversionary end, appellees distort the record (a) in the case at bar and (b) the sole case authority on which they rely, Matter of Malpica-Orsini, 36 N.Y.2d 568.

#### A. DISTORTIONS OF RECORD AT BAR

Appellees' evident purpose here is smokescreen to blur the Fourteenth Amendment violations presented by the appeal. A multitude of peripheral claims made by appellees at the trial, all disputed and none found to exist by the trier of the facts, is raised like a veritable blizzard.

Appellees purport to state facts. Actually, all they do is paraphrase some of their own contradicted trial testimony. Suffice it to say that judicial findings of fact below do not support any of appellees pejorative charges. Indeed, it belies the most serious of them -- that appellant did not support his own children during the period they lived together as a family. (R.20, Appendix C, Jurisdictional Statement):

"During this entire relationship both the natural mother and the putative father were employed and contributed to the support of the family."

None of the charges made by appellees against appellant, even if backed by judicial findings which they were not, would have justified the destruction of his family. They certainly would not have had that effect had he been the female rather than the male parent, nor if he had been married rather than unmarried.

#### B. DISTORTION OF RECORD OF MATTER OF MALPICA-ORSINI

Appellees rely exclusively on this pre-Quilloin decision of the New York Court of Appeals (app.dismd. 423 US 1042), in order to justify stripping a man of his children without overcoming the hurdle of showing him unfit or of having abandoned them. Although Malpica-Orsini was the sole cited authority for the Georgia Supreme Court decision (Quilloin v. Walcott, 238 Ga. 230), it was not cited once by this Court in its affirmance.

If Matter of Malpica-Orsini is authority for anything, since Quilloin, it would be that on its record, there was no substantial constitutional question. The Jurisdictional Statement herein (pp. 16-17) extracted the essence from the stipulation which replaced testimony in that case to show that the stipulated facts "fleshed out no real bonds at all between parent and child" worthy of constitutional protection.

Appellees dispute this. They point to the record in that case to demonstrate that the statute was upheld

despite proof of a substantial parent-child relationship.

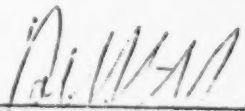
The difficulty with appellees' position is that they pointed to the wrong part of the record in Malpica-Orsini. They recite the claims made by the father in that case in his affidavit. Those claims were never proved. The father waived the opportunity to try to do so. He left all to stipulation. The parties did not stipulate to those allegations. The decision in that case did not rest on the allegations of the father's affidavit, but on the stipulation itself. The description of its contents in the Jurisdictional Statement is vindicated by a simple perusal of the stipulation.

A copy of that stipulation is appended to appellees' motion to dismiss or affirm. For convenience sake, it is also appended hereto.

CONCLUSION

The motion to dismiss or to affirm should be denied in all respects and probable jurisdiction should be noted.

Respectfully submitted this 17th day of April,  
1978.

  
ROBERT H. SILK  
Attorney for Appellant

Suite 1701  
401 Broadway  
New York, New York 10013  
(212) 966-1545

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----x  
In the Matter of the Adoption by :  
CHARLES A. ELASI :  
of :  
HEATHER ALIXON MALPICA-ORSINI :  
Foster Child. :

-----x  
December 18, 1973  
216 Central Avenue  
White Plains, New York 10606

B e f o r e:

HON. VINCENT GURAHIAN  
Judge of the Family Court.

Appearances:

FRANKLYN L. LOWENTHAL, ESQ.  
Attorney for Mr. Elasi  
Office and P. O. Address  
20 South Broadway  
Yonkers, New York 10701

DELSON and GORDON, ESQS.  
Attorneys for Mr. Hector Malpica-Orsini  
Office and P. O. Address  
230 Park Avenue  
New York, New York 10017  
BY: MARVIN SRULOWITZ, ESQ.  
Of Counsel

Thomas A. Mahan  
Court Stenographer.

THE COURT: Now, gentlemen, this record should indicate that we have had some considerable conferences on this case and we have spent more time in conferences than we have in taking testimony. I think you will agree the conferences have been most helpful because it reveals there is no truly substantial issue of fact involved in this case. What you are really dealing with, it seems to me, and I think that you will agree is a question of law. That question of law being the standing of a adjudicated putative to object to an adoption proceeding in the same manner and with the same degree and with the same privileges as would be accorded to an in wedlock father and we have phrased and framed certain stipulations which you would like to put on the record and which we can anticipate will be the basis for an appeal to another Court since this appears to be an issue that has not be resolved or even passed upon by the appellate court.

Am I correct as to the substance of what I have said?

MR. LOWENTHAL: Yes, your Honor.

MR. SRULOWITZ: Yes, your Honor.

THE COURT: Who will put the

stipulation on the record?

MR. SRULOWITZ: I will, your Honor.

It is hereby stipulated and agreed between the parties that;

(1) Corrine Caberti Blasi is the mother of Heather Alison Malpica-Orsini;

(2) That Mr. Orsini is the adjudicated putative father of Heather Alison;

(3) Mr. Charles Blasi is the proposed adoptive parent and is the lawful husband of the mother of the child;

(4) The mother consents to the adoption of her child by her husband;

(5) Mr. Orsini opposes the adoption of his child and has never signed any consent to such adoption;

(6) The objectant, Hector Orsini, has not consented to the adoption nor has he abandoned the child nor waived any other substantive rights he may have pursuant to statute;

(7) It is stipulated and agreed if the parties were called to testify that the Court would have sufficient facts before it, other than abandonment or other waiver of rights by Mr. Orsini, to exercise

its descretion to deny his objections and approve the adoption on the grounds that the overall best interest of the child would warrant it;

(8) There are no factual grounds to justify a finding that Mr. Orsini abandoned or neglected his child;

(9) If Mr. Orsini's standing to object to the adoption of his child under Domestic Relations Law Section 111, Paragraph 3 is to be treated in the same way as the father in wedlock his objections would be upheld and the adoption disapproved.

Next is the two legal questions, your Honor.

THE COURT: Gentlemen, before you get to that, I had suggested for various reasons to go into that and I think we should point out that both parties are cognizant of the fact, regardless of the outcome of this case, no purpose would be served by taking testimony that could some day prove to be of embarrassment either to the parties or to the child and I think that it is in that spirit both of you have agreed to dispense with taking further testimony recognizing, as I said before, that we are really dealing with two legal questions and not factual questions.

Now, I think you wish to state on the record